Weinberg v. National Football League Players Association et al Doc. 7

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
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| **STEVE WEINBERG** | § | |
| | § | |
| **Plaintiff,** | § | |
| | § | |
| **v.** | § | |
| | § | **CIVIL ACTION NO. 3:06-CV-2332-B** |
| **NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, RICHARD BERTHELSEN, GENE UPSHAW, TOM DEPASO, TRACE ARMSTRONG, ROGER KAPLAN, JOHN COLLINS, KEITH WASHINGTON, TONY AGNONE, HOWARD SHATSKY, and MARK LEVIN** | § | **ECF** |
| | § | |
| **Defendants.** | § | |
| | § | |

**BRIEF IN SUPPORT OF DEFENDANT ROGER P. KAPLAN'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

**Introduction**

Plaintiff Steve Weinberg filed the instant action in the Dallas County District Court. Defendant Kaplan, together with the other defendants sued, removed the case to this Court. Kaplan now moves for dismissal for lack of personal jurisdiction.

Weinberg cannot meet his burden of demonstrating Kaplan has established minimum contacts with the State of Texas, or that any exercise of jurisdiction over Kaplan would comply with the traditional notions of fair play or substantial justice. Weinberg cannot make these requisite showings because Kaplan, an individual, is not a Texas resident, maintains no office or records in Texas, is not licensed to practice law in Texas, rarely comes to Texas for any reason, and is not being sued regarding any arbitration he conducted in Texas. As such, Texas does not

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have jurisdiction over Kaplan under its long-arm statute and the instant complaint should be dismissed for lack of personal jurisdiction over Kaplan.

**Statement of Facts**

1. Roger P. Kaplan maintains an office at 211 North Union Street, Suite 100, Alexandria, Virginia 22314. **(APP. P. 2)**

2. Roger P. Kaplan is licensed to practice law in the District of Columbia. He has never sought to be licensed to practice law in the state of Texas. Kaplan does not have a registered agent for service of process in Texas. He was served with the petition in this case in his office in Alexandria, Virginia on December 7, 2006. **(APP. P. 3)**

3. Roger P. Kaplan does not maintain an office or a residence in the state of Texas. Nor does he maintain any records in the state of Texas. **(APP. P. 3)**

4. Roger P. Kaplan serves as an arbitrator in Section 5 and 6 cases for the National Football League Players Association ("NFLPA"). He has served in that capacity since March or April 1994. **(APP. P. 2)**

5. Kaplan has served as an arbitrator in one (1) case in which Steve Weinberg ("Weinberg"), the plaintiff in this litigation, appealed a decision of the NFLPA's disciplinary committee to revoke immediately his certification as a Contract Advisor to NFL players. This case was docketed as NFLPA 03-D1. On February 26, 2003, Kaplan rendered an award denying Weinberg's emergency motion to stay enforcement of the revocation pending his appeal of the disciplinary action imposed by the disciplinary committee. **(APP. P. 5-26)** Weinberg was represented in this arbitration by Wayne G. Travell, a licensed Virginia attorney who practices in McLean, Virginia. **(APP. P. 2, 3)**

6. On September 5, 2003, Kaplan rendered an award on Weinberg's appeal of the NFLPA's disciplinary committee's decision to revoke his certification as a Contract Advisor for

three (3) years. **(APP. P. 27-51)** In his decision, Kaplan changed the revocation to a suspension because he thought the revocation imposed by the disciplinary committee was too harsh. Weinberg was represented in this arbitration by Alan D. Strasser, a licensed attorney who practices in Washington, D.C. **(APP. P. 3)**

7. Both of these hearings were conducted in Kaplan's office in Alexandria, Virginia, and he prepared and issued his awards from that office. Kaplan did not mail a copy of either decision to Weinberg, or to anyone else in the state of Texas. **(APP. P. 3)**

8. Kaplan is required, on occasion, to come to the state of Texas for the purpose of serving as an arbitrator in cases in which he has been appointed. This is strictly for the convenience of the parties to the arbitration. **(APP. P. 3)**

9. Kaplan did not come to Texas to serve as an arbitrator in any of the disputes that are referenced in Weinberg's petition filed in the state court and removed to the federal court. **(APP. P. 3)**

10. Kaplan estimates that he has been in Texas no more than three (3) times in the past five (5) years. **(APP. P. 4)**

## Argument and Authorities

**The Texas Courts Do Not Have Personal Jurisdiction Over Kaplan, an Individual Non-Resident Defendant.**

### A. The Applicable Law

The Texas long-arm statute permits Texas courts to exercise jurisdiction over a non-resident defendant who does business in Texas. *See Tex. Civ. Prac. & Rem. Code Ann. §17.041 et. seq.* (Vernon 1997). The long-arm statute defines "doing business" as: (1) contracting by mail or otherwise with a Texas resident with performance either in whole or in part in Texas; (2) commission of a tort in whole or in part in Texas; (3) recruitment of Texas residents directly or through an intermediary located in Texas; or (4) performance of any other act that may constitute doing business. *Id.* The broad language of the long-arm statute permits Texas courts to exercise jurisdiction "as far as the federal constitutional requirements of due process will permit." *BMC Software, Belg. N V v. Marchand,* 83. S.W.3d 789, 795, 45 Tex. Sup. Ct. J. 930 (Tex. 2002). The party seeking to assert jurisdiction, Plaintiff Weinberg, bears the burden of establishing contacts by the non-resident defendant sufficient to invoke the jurisdiction of the Court. *Felch v. Transportes Lar-Mex Sa De Cv.* 92 F.3d 320, 325 (5th Cr. 1996) *quoting Bullion v. Gillespie* 895 F.2d 213, 217 (5th Cir. 1990).

Personal jurisdiction over nonresident defendants meets the due process requirements of the Constitution when two conditions are met: (1) the defendant has established minimum contacts with the forum state; and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *BMC* Software, 83 S.W.3d at 795 (citing *Int'l Shoe Co. v. Washington, 326 U.S.* 310, 316 (1945)). Personal jurisdiction exists if the nonresident defendant's minimum contacts give rise either to general or specific jurisdiction. *Helicopteros Ivacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 413-414 (1984); *BMC Software,* 83 S.W.3d at 795-796. General jurisdiction is present when the defendant's contacts in a forum are continuous and systematic so that the forum may exercise personal jurisdiction over the defendant even if the cause of action did not arise from, or relate to, activities conducted within the forum state. *BMC Software,* 83 S.W.3d at 796; *Schlobohm v. Schapiro,* 784 S.W.2d 355, 357, 33 Tex. Sup. Ct. J. 222 (Tex. 1990). Specific jurisdiction may be established if the nonresident defendant's alleged liability arises from, or is related to, activity conducted within the forum. *BMC Software,* 83 S.W.3d at 796. The minimum contacts analysis for specific jurisdiction focuses on the relationship of the defendant to the forum, and the nature of the

litigation. *Helicopteros,* 466 U.S. at 414; *Schlobohm,* 784 S.W.2d at 357; *Michiana Easy Livin' Country, Inc. v. Holten,* 168 S.W.3d 777, 790, 48 Tex. Sup. Ct. J. 789 (Tex. 2005). Neither general nor specific jurisdiction exists here.

The "touchstone" of jurisdictional due process analysis is "purposeful availment." *Michiana,* 168 S.W.3d at 784 (citing *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)). "It is essential in each case that there be some act by which the defendant 'purposefully avails' itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Michiana,* 168 S.W.3d at 784.

The Texas Supreme Court considers three important aspects before finding the existence of "purposeful availment." First, it is only the defendant's contacts with the forum that count: purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of ... the 'unilateral activity of another party or a third person.'" *Michiana,* 168 S.W.3d at 785 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985)). Second, the acts relied upon must be "purposeful" rather than "random, isolated or fortuitous." *Michiana,* 168 S.W. 3d at 785 (quoting *Keeton v. Hustler Magazine Inc.,* 465 U.S. 770, 774 (1984)). Third, a defendant must seek some benefit, advantage, or profit by "availing" himself of the jurisdiction. By invoking the benefit and protections of a forum's laws, a nonresident consents to suit there. *Michiana,* 168 S.W.3d at 785 (citing *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980)). Significantly, the *Michiana* Court conversely noted that a non-resident may purposefully avoid a jurisdiction, rather than purposefully avail himself of a jurisdiction, by structuring transactions neither to profit from the forum's laws nor be subject to its jurisdiction. *Michiana,* 168 S.W.3d at 785 (citing *Burger King Corp.,* 471 U.S. at 475.)

Finally, in addition to minimum contacts, the exercise of personal jurisdiction must comport with traditional notions of fair play and substantial justice. *BMS Software,* 83 S.W.3d at 795. The following factors are considered in making that determination: (1) the burden on the nonresident defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering substantive social policies. *World-Wide Volkswagen,* 444 U.S. at 292; *Guardian Royal Exchange Assur., Ltd v. English China Clays,* 815 S.W.2d 223, 231, 34 Tex. Sup. Ct. J. 376 (Tex. 1991).

**B. Kaplan Did Not Purposefully Avail Himself of the Privilege of Conducting Business in Texas**

Kaplan has no contacts with Texas and did not avail himself of the privilege of conducting business within the state. Kaplan is an individual. He has no office in Texas and maintains no records or files in Texas. He is not licensed to practice law in Texas and has been in Texas only approximately three (3) times in this past five (5) years. Kaplan does not have a registered agent in Texas. Finally, the arbitration awards Kaplan rendered which are referenced in Weinberg's petition were not heard in Texas, were not decided in Texas, were not prepared in Texas, and were not mailed to Texas by Kaplan.

As the U. S. Supreme Court noted in *Burger King Corp.,* "the constitutional touchstone" for asserting personal jurisdiction over a non-resident defendant is "whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King* at 474. The *Burger King* Court also discussed the role of foreseeability in establishing such contacts by stating the "foreseeability that is critical to due process analysis is that the defendant's conduct and connection with the forum state are such that they should reasonably anticipated being haled into Court there." *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000) quoting *Burger King* at 474 and *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 297.

On the facts outlined above, Kaplan could not possibly have foreseen or anticipated being haled into Court in Texas. Indeed, the opposite is true. Kaplan's arbitrations were heard in Virginia, decided in Virginia, and prepared in Virginia. Given the lack of any contacts between Kaplan and Texas, he could not possibly be found to have consented to being sued in Texas or to somehow have invoked the benefits and protections of Texas' laws. *See, AM Type Culture Collection v. Coleman* 83 S.W.3d 801 (Tex. 2002). In short, regardless of Weinberg's unilateral attempt to invoke jurisdiction over Kaplan in a court in Texas, none of the three *Michiana* factors is satisfied here. Kaplan did not purposely avail himself of the privilege of conducting business within Texas. No personal jurisdiction therefore exists and the Complaint should be dismissed.

**C. Traditional Notions of Fair Play and Substantial Justice also Mitigate Against the Maintenance of the Action in Texas**

None of the five cited fair-play factors supports the maintenance of this suit against Kaplan in Texas. Instead, all the factors demonstrate the exercise of jurisdiction by a Texas court would not comport with due process. The burden on Kaplan to defend the action in Texas would be great. Kaplan is a non-resident who maintains no office in Texas, seldom comes to Texas, and conducted no business in Texas involving the subject matter of Weinberg's petition. For these reasons, Texas has little or no interest in adjudicating a dispute that Weinberg might have with Kaplan. Weinberg may well be interested in obtaining relief in a forum which is personally and selfishly convenient, but that is not a basis for exercising jurisdiction over Kaplan in Texas. The analysis of the traditional due process factors requires that the Court decline to exercise jurisdiction over Kaplan. The Complaint should be dismissed.

## Conclusion

The facts, the statutes, and the underlying public policy all require that Kaplan not be forced to defend himself in Texas. For all the foregoing reasons, the Complaint should be dismissed for lack of personal jurisdiction over Kaplan, and because due process requires such a dismissal.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT**
**ROGER P. KAPLAN**

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the **27th** day of December 2006, true and correct copies of the foregoing *Brief in Support of Defendant Roger Kaplan's Motion to Dismiss for Lack of Personal Jurisdiction* were served by certified mail, return receipt requested, upon counsel for Plaintiff, Lawrence J. Friedman, FRIEDMAN & FEIGER, LLP, 5301 Spring Valley Road, Suite 200, Dallas, TX 75254 and counsel for Defendants, David Greenspan, DEWEY BALLANTINE, LLP, 1301 Avenue of the Americas, New York,, NY 10019-6092 and Ralph Miller, WEIL, GOTSHAL & MANGES LLP, 200 Crescent Court, Suite 300, Dallas, TX 75201.

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